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The Honorable Robert H. Whaley

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUN 08 2000

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 ROBERT E. WHITE, et al.,
11 Plaintiffs,
12 v.
13 DR. C. ALVIN PAULSEN, et al.,
14 Defendants.
15
16 DON BYERS, et al.,
17 Plaintiffs,
18 v.
19 C. ALVIN PAULSEN, M.D., et al.,
20 Defendants.

No. CS 97-0239 RHW

MEMORANDUM REGARDING:

- (1) STATUS REPORT REGARDING
SETTLEMENT
ADMINISTRATION;
(2) MOTION TO APPROVE OR
REJECT CERTAIN CLAIMS; AND
(3) MOTION FOR FINAL AWARD
OF ATTORNEYS' FEES AND
COSTS

Hearing Date:

July 26, 2000, at 10:00 a.m.

21 I. INTRODUCTION AND RELIEF REQUESTED

22 The steps necessary to implement the settlement have been undertaken.
23 Significant preliminary distributions have been made to all class members whose
24 claims were approved. The settlement administration process is now ready to be
25 concluded so that final distributions can be made. As part of that process, however,
26 the Court needs to first decide whether certain claims submitted should be approved or

PLAINTIFFS' MEMORANDUM - 1

ORIGINAL

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1 rejected. An award of attorneys' fees and costs incurred in connection with the
 2 settlement administration process also needs to be made. The purpose of this motion,
 3 therefore, is to (i) provide a status report regarding the implementation of the
 4 settlement, (ii) have the Court approve or reject certain claims, and (iii) make a final
 5 award of attorneys' fees and costs.

6 II. BACKGROUND

7 A. The Order Approving the Settlement.

8 In its Order Approving Settlement and Awarding Attorneys' Fees and Costs,
 9 dated March 23, 2000 ("Approval Order"), the Court (i) certified the settlement class,
 10 (ii) approved the \$2.4 million settlement, (iii) approved an award of fees and costs,
 11 and (iv) approved a set-aside of \$50,000 for future settlement implementation-related
 12 legal fees and costs with the residual, if any, to be distributed pro rata to radiated class
 13 members. Based upon the information then available, the Approval Order reflects
 14 that, after deduction of fees and costs, the then-projection was that each radiated class
 15 member would receive approximately \$30,000 as a "base" amount; the 15 named
 16 plaintiffs would each receive an additional \$5,000; and the four original plaintiffs an
 17 additional \$5,000. Children were to each receive \$1,000.

18 B. The Proof of Claim Submission and Verification Process.

19 The Approval Order was sent to all potential class members known to class
 20 counsel. Three versions of Proof of Claim forms ("Form(s)") were prepared. One was
 21 for persons claiming to be radiated class members; another for Estates of such persons;
 22 and a third for people claiming to be children of radiated class members.¹ The Forms
 23 required each putative class member to provide sufficient proof that they were, in fact,
 24 a class member. Persons claiming to have been radiated were asked to provide as
 25 much detail as they could recall concerning other experiment subjects, the location of

26 ¹Copies of the Forms utilized are attached collectively as Exhibit 1.

1 the experiments, the persons involved, whether they underwent a vasectomy, their
2 identifying number, period of incarceration, and similar information. Estates were
3 required to have a duly-appointed personal representative sign the Form and attach a
4 copy of an appropriate court order appointing the personal representative. Natural
5 children were required to submit birth certificates. Adopted children were required to
6 submit proof of adoption.

7 A significant amount of time was spent communicating with potential claimants
8 (both telephonically and in writing) regarding completion of the Forms, supplying
9 additional information, assisting with the retention of independent Estate counsel,
10 communicating with Estate counsel, and similar tasks.

11 Any person who was sent a Form but did not submit a completed one within the
12 required 30 days was contacted to be sure that they had, in fact, received the Form.
13 Anyone who requested additional time beyond the 30 days to either submit the
14 completed Form or provide additional information was granted additional time.

15 The persons claiming to be radiated class members were cross-checked against
16 two sources of documentary records. The Washington Attorney General's Office had
17 previously produced in discovery a list of the 64 persons radiated (the "AG List"). Dr.
18 Paulsen also had records detailing the identity of those persons participating in the
19 radiation experiments, as well as persons participating in other experiments Dr.
20 Paulsen was conducting that did not involve radiation (the "Paulsen List"). Both the
21 AG List and the Paulsen List identified the radiated subjects by name and social
22 security number. Class counsel did not have the Paulsen List because it had the
23 identity of many non-class members (i.e., persons who participate in other Paulsen
24 experiments and a "control subject"), and details about their medical situation. Dr.
25 Paulsen's counsel was understandably concerned about physician-patient privilege
26 issues. Dr. Paulsen's counsel did, however, specifically check the Paulsen List in each

instance requested. Class counsel was advised whether the individual inquired about was or was not shown on the Paulsen List as having been radiated. Thus, each person claiming to be a radiated class member was cross-referenced to, first, the AG List, and second, if they were not on that list, the Paulsen List.

C. The Results of the Proof of Claim Process and the Initial Distribution.

All claims submitted by persons claiming to have been radiated who (i) submitted fully-completed Forms and (ii) were on the AG List or the Paulsen List as a radiated subject were approved. Claims submitted by children of such persons also were approved. The results were as follows:

Radiated Claimants		Children Claimants	
Total claims received:	31	Total claims submitted:	14
Claims approved to date:	25	Claims approved to date:	9 ²
Claims not approved:	6	Claims not approved:	5

On May 5, 2000, a preliminary distribution was made to all class members whose claims had been approved.³ Approved radiated class members received a "base" payment of \$30,354.84, plus \$5,000 if they were a named plaintiff, and an additional \$5,000 for each of the original four plaintiffs. Approved children claimants each received \$1,000. Over the next several weeks, several additional claims were approved and distributions made as claimants provided additional documentation

²Of these nine children claims, eight have actually been paid to date. The ninth is awaiting a copy of a birth certificate. All numbers and calculations assume that the ninth claim will be perfected and paid by the time of the hearing.

³Copies of the communications sent to approved claimants are attached as Exhibit 2.

1 required to perfect their claims. As a result, to date \$862,871 has been distributed to
2 approved class members (\$853,871 to radiated claimants; \$9,000 to children).

3 Those persons whose claims were not approved ("Unapproved Claimants")
4 were notified of such, and the reason why.⁴ Unapproved Claimants were told that the
5 Court would make the final determination regarding approval or rejection of their
6 claims and that they would have an opportunity to participate in that process. All
7 Unapproved Claimants also have been notified of this hearing, provided with
8 information regarding how to participate telephonically or in writing, if they wish, and
9 they have been served by mail with this and the related pleadings.⁵ Six weeks' prior
10 written notice was given to all Unapproved Claimants.

11 III. THE CLAIMS SUBMITTED WHICH THE COURT 12 NOW NEEDS TO EITHER APPROVE OR REJECT

13 The Court needs to decide whether the following claims should be approved or
14 rejected.

15 A. Unapproved Alleged Radiated Class Members.

16 1. Nelson A. Anselment. Mr. Anselment submitted a timely and
17 completed Form.⁶ Mr. Anselment was not, however, on either the AG List or the
18 Paulsen List. His claim was not approved primarily for that reason. In addition, Mr.
19 Anselment indicated that he had not undergone a vasectomy. All but a few
20 experiment subjects who were radiated underwent vasectomies. Due to his not being
21 on either list and not having undergone a vasectomy, class counsel believes it likely
22 that Mr. Anselment does not qualify as a radiated class member.

23 ⁴Copies of the communications sent to the Unapproved Claimants are attached as Exhibit 3.

24 ⁵A copy of the cover-letter notification sent to Unapproved Claimants accompanying these
25 pleadings is attached as Exhibit 4.

26 ⁶The Form submitted by Mr. Anselment is attached.

2. Warren Halverson. Mr. Halverson submitted a timely and completed Form.⁷ However, he also was not on either the AG List or the Paulsen List. Mr. Halverson also indicated in his Form that he had received his radiation in "pill" form. This is inconsistent with how the experiments were conducted. The radiation treatments were administered via an x-ray machine. On the other hand, there are records that show that, as early as the mid-1980s, Mr. Halverson believed he had been radiated, and he had retained counsel to pursue a claim. These same records disclose, though, that even back then, Dr. Paulsen advised Mr. Halverson's then counsel that he had not been radiated.⁸ On balance, class counsel believes it likely that Mr. Halverson does not qualify as a radiated class member.

3. Lloyd R. Moore, Sr. Mr. Moore submitted a timely and completed Form.⁹ However, he, too, is not on either the AG List or the Paulsen List. His Form also indicates that he did not undergo a vasectomy. As previously indicated, virtually all radiated experiment subjects underwent vasectomies. Class counsel believes it likely that Mr. Moore does not qualify as a radiated class member.

4. Leslie B. Riggins. Mr. Riggins submitted a timely and completed Form.¹⁰ Mr. Riggins claims to have undergone surgery for cancer in the groin area and that afterwards he received "cobalt radiation" treatment. Mr. Riggins' complaint appears to be that he was subsequently advised by a physician that he did not have cancer such that both the surgery and any cobalt radiation treatments were not

⁷The Form submitted by Mr. Halverson is attached.

⁸Copies of the mid-1980's correspondence involving Mr. Halverson are attached behind his Form.

⁹The Form submitted by Mr. Moore is attached.

¹⁰The Form submitted by Mr. Riggins is attached.

1 necessary. Mr. Riggins is not on either the AG List or the Paulsen List. Class counsel
2 does not believe that Mr. Riggins qualifies as a class member.

3 5. Martin Nelson Smith. Mr. Smith submitted a timely and
4 completed Form.¹¹ Mr. Smith is not on either the AG List or the Paulsen List. Mr.
5 Smith also reports that he did not undergo a vasectomy. Class counsel believes it
6 likely that Mr. Smith probably does not qualify as a class member.

7 6. George D. Taté. Mr. Taté submitted a timely and completed
8 Form.¹² Mr. Taté was not on the AG List, nor is he on the Paulsen List. In addition,
9 Mr. Taté did not undergo a vasectomy. Mr. Taté claims to have been scheduled for a
10 vasectomy but that the program allegedly ended before his scheduled vasectomy, and
11 for that reason he did not undergo a vasectomy. That information is inconsistent with
12 confirmed radiated subjects who did undergo vasectomies after the radiation
13 experiment program had ended. Mr. Taté's wife, nonetheless, indicated that both she
14 and he still feel very strongly that Mr. Taté is a radiated class member. Because of
15 this, class counsel traveled to the penitentiary at McNeil Island and personally
16 interviewed Mr. Taté. The summary of that interview is attached with Mr. Taté's
17 Form. The interview did not reveal any new decisive information one way or the
18 other. Mr. Taté's medical records are silent regarding whether he underwent radiation.
19 The records do mention that certain biopsies were performed. Class counsel believes
20 that Mr. Taté has not met the requirements necessary to establish class membership.¹³
21
22

23 ¹¹The Form submitted by Mr. Smith is attached.

24 ¹²The Form submitted by Mr. Taté is attached.

25 ¹³There was one "control person" who was not radiated but probably, in all respects, was led
26 to believe they were radiated. It is possible that Mr. Taté was that person, but class counsel have no

1 B. Unapproved Alleged Children of Radiated Class Members.

2 All persons claiming to be radiated class members were asked in the Form to
3 identify any children they had. Forms were then sent to all children identified. Five
4 people submitted children claims who are children of individuals whose claims as
5 radiated class members were not approved. Only children of radiated class members
6 are eligible to receive a distribution. Class counsel believes that the following claims,
7 all of which were submitted by children of Unapproved Claimants, should not be
8 approved:

9 1. Claims by Children of Martin Smith.

10 a. David P. Smith

11 2. Claims by Children of Lloyd Moore, Sr.

12 a. Lucille A. Moore

13 b. Lloyd R. Moore, Jr.

14 c. Kenya L. Moore

15 d. Clayton N. Moore

16 IV. REQUEST FOR FINAL AWARD OF
17 ATTORNEYS' FEES AND COSTS

18 The Approval Order provided for a set-aside of \$50,000 to cover legal fees and
19 costs arising from settlement implementation and administration. Although the effort
20 required to implement the settlement has been extensive, nowhere near \$50,000 has
21 been expended. Instead, based upon the time spent and actual costs incurred, class
22 counsel is requesting a further award of \$21,833 for fees and reimbursement of
23 \$2,416.70 for costs and expenses. This amount consists of the actual value of the time

24 _____
25 way of knowing. In any event, a "control person" who was not radiated is not an eligible class
26 member.

1 spent through May 31, 2000, the costs incurred through that same date, plus \$5,000 to
 2 cover fees and costs since then for the finalization of these papers, preparation for and
 3 attendance at the hearing on these motions, to implement the final distribution to class
 4 members, issue Form 1099s at year-end, and for what undoubtedly will be many
 5 further follow-up communications with class members. Supporting detail and
 6 documentation for the fee and cost award is set forth in the Affidavit of Bradley S.
 7 Keller Regarding Request for Final Award of Fees and Costs being submitted
 8 concurrently.

9
 10 **V. PROJECTED FINAL DISTRIBUTION**
TO RADIATED CLASS MEMBERS

11 During the administration of the settlement, approximately \$81,000 in interest
 12 was earned on the funds. If no further claims are approved, and if the fees and costs
 13 requested are awarded, there will be an additional approximately \$294,179 available to
 14 be distributed among the 25 approved radiated class members. This would result in a
 15 further final distribution of approximately \$11,767 to each approved radiated class
 16 member. In that event, the total net amounts actually distributed to radiated class
 17 members will be:

18 Preliminary base distribution	\$30,354.84
19 Approximate final distribution	\$11,767.00
20 SUBTOTAL	\$42,121.84
	+ \$5,000.00 (for named plaintiffs)
	+ \$5,000.00 (for original four plaintiffs)

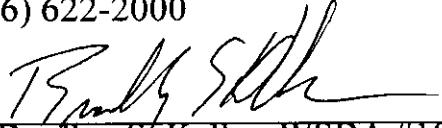
23 **VI. SUMMARY**

24 Based upon the information provided in this report, class counsel requests that
 25 the Court (i) approve or reject certain claims, and (ii) make a final award of attorneys'
 26 fees and costs.

1 DATED this 6th day of June, 2000.

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ATTACHMENTS
NOT
SCANNED